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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

TOM HORNE, ARIZONA STATE SUPERINTENDENT OF SCHOOLS; ARIZONA STATE DEPARTMENT OF EDUCATION, Plaintiffs, vs. UNITED STATES DEPARTMENT OF EDUCATION; MARGARET SPELLINGS, in her capacity as Secretary of the United States Department of Education, Defendants.	No. **COMPLAINT FOR DECLARATORY JUDGMENT**

For its complaint against Defendants, Plaintiffs allege as follows:

1. This is a complaint for declaratory judgment and damages under 28 U.S.C. § 2201.

2. This Court has jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1331.

3. Venue is appropriate pursuant to 28 U.S.C. § 1391(e) (2) because a substantial part of the events or omissions giving rise to the claim occurred in this district and pursuant to 28 U.S.C. § 1391(e) (3) because the Plaintiffs are situated in this district and the action involves no real property. Venue is also appropriate pursuant to 5 U.S.C. § 703 because there is no "special statutory review proceeding relevant to the subject matter in a court specified by statute."

The Parties

4. Plaintiff, Arizona State Department of Education ("ADE"), is an agency of the State of Arizona and is the State Educational Agency ("SEA") charged with administering the State Accountability Plan ("State Plan") under the No Child Left Behind Act ("NCLB"). 20 U.S.C. §6311. Plaintiff, Tom Horne, Superintendent of Public Instruction (the "Superintendent") is an elected official and pursuant to A.R.S. § 15-231(B) (2) is responsible for all executive, administrative and ministerial functions of ADE.

5. Defendant, United States Department of Education ("USDOE"), is an agency of the United States of America charged with administering NCLB. Defendant, Margaret Spellings is the United States Secretary of Education and is charged with the supervision and direction of the USDOE. 20 U.S.C. §3411.

6. An actual, substantial, and justiciable controversy exists that authorizes this court to hear this matter as set forth below.

The NCLB and Adequate Yearly Progress ("AYP")

7. Title I of the Elementary and Secondary Education Act of 1965 ("ESEA") provides for federal education grants to states that meet certain requirements. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-7941). On January 8, 2002, President George W. Bush signed NCLB into law, a comprehensive educational reform package that amended the ESEA. Pub. L/ No. 107-110, 115 Stat. 1425.

8. The primary purpose of NCLB is to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments." 20 U.S.C. § 6301.

9. The NCLB requires each state that receives Title I funds to determine that its public schools are making Adequate Yearly Progress ("AYP") toward enabling all students to meet the state's academic achievement standards. A school's AYP is determined in large part through the use of standardized tests. NCLB requires that such tests be given annually to all students, including students whose understanding of English is limited. Students whose understanding of English is limited are referred to in NCLB as "limited English proficient" ("LEP") students.[1] 20 U.S.C. § 6311(b) (3) (C) (ix); *see* 34 C.F.R. § 200.6(b).

10. Generally speaking, a school fails to make AYP if one of certain specified subgroups of students in any grade fails to meet the state's academic achievement standards. 20 U.S.C. § 6311(b) (2) (I). LEP students are one of the specified subgroups that must meet AYP standards. 20 U.S.C. § 6311 (b)(2)(C)(4). Congress recognized that measures of AYP may be invalid for "statistical or substantive reasons" by enacting 20 U.S.C. §6316(b) (2) (B). The language of 20 U.S.C. §6316(b) (2) (B) and (C) also recognized the need to permit states discretion in determining what assessment scores may be invalid for statistical or substantive reasons.

11. A school that fails to make AYP is identified under the NCLB for improvement, corrective action, or restructuring. 20 U.S.C. § 6316(b) (1)-(8). A school

[1] The terms LEP student and English Language Learner ("ELL") student are used interchangeably in this area of public education. The State typically uses the term "ELL student" and USDOE typically uses the term "LEP student." For simplicity sake, the term "LEP student" is generally used in this complaint.

may appeal any such identification to the SEA on the grounds that the identification "is in error for statistical or other substantive reasons[.]" 20 U.S.C. § 6316(b) (2) (B).

12. Federal statutes and regulations do not define what types of situations qualify as an appeal "for statistical or other substantive reasons." The SEA is required to consider the appeal before making a final determination as to the school's identification status. 20 U.S.C. § 6316(b)(2)(B).

13. Arizona's standardized test for determining whether its schools are making AYP is the Arizona Instrument to Measure Standards ("AIMS") test. A.R.S. § 15-741. Consistent with the NCLB, AIMS tests are given annually to all Arizona public school students. 20 U.S.C. § 6311(b) (2)-(3); A.R.S. § 15-741(A) (2).

14. To accommodate the special needs of LEP students, NCLB provides that such students, during their first three years of school in the United States, "shall be assessed in a valid and reliable manner and provided reasonable accommodations of assessments . . . including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas[.]" 20 U.S.C. § 6311(b) (3) (C) (ix)-(x); *see* 34 C.F.R. § 200.6(b).

15. However, in November 2000, and prior to the enactment of NCLB, Arizona voters approved Proposition 203, an initiative regarding English language education for public school students. *See* A.R.S. §§ 15-751 to 755. Proposition 203 requires, among other things, that all Arizona students be taught in English and standardized tests be given in English. *See* A.R.S. § 15-752 and 755. Prop 203 recognizes the reality that English proficiency is critical to real academic achievement and post educational success. This requirement, however, prevents Arizona schools from testing LEP students in their native languages as permitted by NCLB. *See* 20 U.S.C. § 6311(b) (3) (C) (ix); A.R.S. § 15-755.

16. Proposition 203 and state demographics place Arizona in a unique situation with respect to NCLB. First, Arizona has large numbers of LEP students. In states where the number of LEP students is small, LEP student proficiency has little or no consequence upon the ability of schools to make AYP because, for statistical purposes, there must be a certain number of students from a given subcategory at a given grade level and subject (referred to as the "n" number) before those scores would be permitted to count in a school AYP calculation. Second, in other states, the language deficiency could be compensated for by testing the students in their native language. This method of testing LEP students in their native language is not available to Arizona Schools because of Proposition 203.

17. Concerned about the impact NCLB would have on Arizona schools with a large number of LEP students, the Superintendent engaged in negotiations with USDOE regarding how to handle LEP student test scores under NCLB. Because of the absence of a rule interpreting what types of situations qualify for an appeal "for statistical or substantive reasons," USDOE and Arizona reached an agreement on the interpretation of that provision. The negotiations ultimately led to the following 2003 agreement reflecting that interpretation: In return for Arizona's support of NCLB, ADE would include the test scores of all LEP students; however, any school that failed to make AYP as a result of such scores could appeal that determination in accordance with 20 U.S.C. § 6316(b) (2) (B). ADE and the Superintendent would have discretion under 20 U.S.C. § 6316(b) (2) (B) to grant such appeals and authorize schools to exclude the test scores of LEP students within the first three years of English instruction at the school solely for AYP calculation purposes. This interpretation allowed Arizona Schools to avoid the inappropriate skewing of their AYP scores. The USDOE required, as a condition of this agreement, that it remain oral, in order that it not be copied by other states; however, the existence of this agreement is evidenced in written communication by a member of USDOE's negotiating team.

18. The statistical basis for the parties' agreement and interpretation of 20 U.S.C. § 6316(b) (2) (B) was that the scores of the LEP students with less than three years English instruction made the results psychometrically unreliable. These test scores are unreliable because they may reflect only a student's language proficiency rather than the student's academic proficiency.

19. This agreement and interpretation also synchronized Arizona's federal accountability system under NCLB with Arizona's own accountability system on this issue, Arizona Learns. *See* A.R.S. § 15-241.

20. ADE entered into the agreement because the Superintendent was concerned that although LEP students may achieve English language proficiency in a year or two, many students require a third year to become academically proficient in English sufficient to pass an academic assessment in English.

21. USDOE entered into the agreement in recognition of Arizona's unique situation and to secure the Plaintiffs' support for NCLB and Plaintiffs' participation in NCLB's bill signing ceremony in the White House Rose Garden on June 10, 2003.

22. This agreement reflected both USDOE's and ADE's interpretation of the right to grant appeals under 20 U.S.C. § 6316(b) (2) (B) and reasonably met the intent of that provision. Further, it was the expectation of both parties that this agreement be a binding, permanent agreement that would govern the parties' interactions in this area until a formal regulation was promulgated. In fact, the Plaintiffs would not have executed and filed the State Plan without this verbal agreement. To date, no regulation interpreting 20 U.S.C. § 6316(b)(2)(B) and (C) has been promulgated.

School Assessment, Accountability, and Appeals under NCLB.

23. One of the purposes of requiring that a state conduct an assessment is to determine a school's progress in closing academic achievement gaps between disadvantaged students. 20 U.S.C. § 6301.

24. At the time of the agreement, USDOE and ADE's interpretation of 20 U.S.C. §6316(b) (2) (B) was consistent with statements made by former Secretary of Education Rod Paige, who cited the need for "greater flexibility" in allowing states and local school districts to meet the accountability requirements of the NCLB with respect to LEP students.

25. In addition, this interpretation of 20 U.S.C. § 6316(b) (2) (B) is consistent with the overwhelming majority of scientific studies and research on this issue. *See, Examination of Differential Item Functioning on a Standardized Achievement Battery with Limited English Proficient Students*, Education and Psychological Measurement 2000 vol. 60, p. 565.

Implementation of the Rule and USDOE's failure to adhere to the Agreement

26. ADE implemented this agreement and began granting appropriate appeals based on the provisions of 20 U.S.C. § 6316 (b) (2) (B).

27. In April 2005, USDOE audited ADE's compliance with NCLB. USDOE issued a report that found, among other things, that ADE's practice of granting appeals under 20 U.S.C. § 6316(b) (2) (B) to schools that failed to make AYP, due to the test scores of LEP students with less than three years of language instruction, violated NCLB. The report required ADE to "cease the practice of allowing appeals on the basis of . . . LEP students with less than three years of language education services." *Id.*

28. USDOE's finding prevented ADE from granting any more appeals in accordance with 20 U.S.C. § 6311(b) (2) (B) to schools that failed to make AYP due to the test scores of LEP students with less than three years of English instruction. USDOE's finding on this issue specifically stated:

> Finding: The ADE permits school/districts to appeal the identification for improvement based on results from students tested with non-standard accommodations and limited English proficient (LEP)

students served less than three years. This practice effectively removes these student scores completely from final determination for school improvement.

Citation: Section 6316(b)(2)(B) of the ESEA allows the principal or the majority of parents of a school proposed for identification for improvement may provide supporting evidence if they believe the proposed identification is in error for statistical or other substantive reason.

Further action required: The ADE must cease the practice of allowing appeals on the basis of scores that result from students tested with non-standard accommodations or LEP students with less than three years of language education services. Furthermore, the ADE must implement testing practices that enhance the valid and reliable assessment of students with disabilities and English language learners so that non-standard accommodations and linguistic barriers are minimized. ADE must provide documentation to confirm that districts have been notified of these changes.

April, 2005, Title One Monitoring Report, at p. 9-10.

29. The USDOE's finding was directly contrary to the agreement that was previously reached between ADE and USDOE. USDOE's new interpretation of 20 U.S.C. § 6316 (b)(2)(B) is arbitrary and capricious and is not reasonably supported under the law.

30. USDOE's new interpretation of 20 U.S.C. § 6316(b)(2)(B) prohibiting the granting of the appeal is contrary to the discretion granted Plaintiffs under the statute and contrary to law. 20 U.S.C. § 6316(b) (2) (B).

31. In addition, USDOE is incorrect in assuming that Plaintiffs granting of appeals effectively removes LEP students the improvement process. The LEP students are still tested, their tests are graded and schools and teachers are given the results of those students' test scores so that appropriate progress and intervention can be addressed and measured.

32. Further, USDOE's finding violates 20 U.S.C. 7907(a), which prohibits USDOE from mandating, directing, or controlling a state's curriculum.

33. USDOE recently adopted regulations exempting LEP students from a school's AYP calculations for one year. 34 C.F.R. § 200.6(b) (4) (iv).

34. Although USDOE's regulation granting a one year exemption was purportedly made in an effort to deal with various states' concerns over the testing of LEP students, the one year exemption, rather than the three years agreed to with Arizona is arbitrary and capricious and not based on any scientific research or study. In fact, Plaintiff Horne specifically asked the official representing USDOE whether there was a scientific basis in education research that supported an exemption of one year rather than three and was told there was none.

35. Regardless of why USDOE decided to grant a one year exemption for LEP students, the rule does not interpret or involve the appeals process set forth in 20 U.S.C. §6316(b) (2) (B) and (C).

Prior Legal Action

36. In July, 2006, ADE brought an action against USDOE and Secretary Spelling over USDOE's new interpretation of 20 U.S.C. § 6316(b) (2) (B).

37. ADE brought its case directly to federal court because it could not identify an administrative review process and because of the fear that any administrative challenge under the General Education Provisions Act, would require Arizona to risk hundreds of millions of dollars in federal funding, a risk too great for the State to assume.

38. USDOE filed a motion to dismiss the complaint pursuant to Rule 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure and the Arizona Federal District Court heard oral argument on February 1, 2007. In urging this Court to find that ADE had failed to exhaust its administrative remedies, USDOE's counsel identified a process

that ADE could follow that would provide a final agency decision and an opportunity for judicial review without requiring Arizona to risk its federal funding in challenging USDOE's new interpretation of 20 U.S.C. § 6316(b) (2) (B).

39. USDOE's counsel claimed, that if ADE filed a proposed amendment regarding the appeals process and if Secretary Spellings ultimately rejected the State Plan amendment as a final agency decision, ADE could seek immediate judicial review in district court under the Administrative Procedures Act. *See* Exhibit 1, Transcript of Oral Argument, at p. 6 ln. 25 – p. 8 ln. 19. The Arizona Federal District Court identified this process in its February 6, 2007 Court Order and relied on the existence of this process in dismissing the case, finding that the Plaintiffs' failed to exhaust their administrative funding. Exhibit 2, Arizona Federal District Court Order dated February 5, 2007, p. 10, lns. 5-21.

40. In conformity with the Court's order, ADE amended its State Plan to include Element 9.2, which allowed "as grounds for appeal of an Arizona school's AYP determination, evidence that the school's failure to make AYP is due to the inclusion of the non-proficient scores of limited English proficient (LEP) students who are in the first three years of enrollment in a school in the United States." *See* Exhibit 3, Letter from Kerri L. Briggs, Ph.D., dated June 28, 2007, at p. 2.

41. On June 28, 2007, USDOE officially notified ADE that its proposed amendment to Element 9.2 had been rejected. Exhibit 3, p. 2.

42. On July 13, 2007, the Arizona Attorney General's Office on behalf of ADE requested a formal hearing in accordance with the Court's order and 20 U.S.C. §6311(e) (1) (E), which states that "the Secretary shall . . . not decline to approve a State's plan before:

(i) offering the state an opportunity to revise its plan;

(ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c); and

(iii) ***providing a hearing***. . . ." (Emphasis Added)

43. USDOE sent a letter on August 6, 2007, denying ADE's request for a hearing, arguing that "the State of Arizona has no right to a hearing based on the denial of the State's requested amendment to its Accountability Plan." Exhibit 4, Letter to Mr. Chad Sampson dated August 6, 2007. This decision by USDOE prevented Plaintiffs from exhausting their administrative remedies.

44. In October, 2007, AYP labels were assigned to Arizona schools. As a result of USDOE's wrongful actions, approximately 78 Arizona schools have failed to make AYP for the past two consecutive years and have been placed in School Improvement under NCLB.

45. As a result of these "failing to make AYP" labels, ADE and these schools are required to unnecessarily expend time, effort, and resources that they would not have been required to expend had the schools been able to appeal their label under 20 U.S.C. § 6316(b) (2) (B).

46. In addition to the statutorily mandated consequences under NCLB, "failing to make AYP" suffer unintended consequences and loss. These consequences include the Schools' loss of reputation and loss of state funding.

47. In addition to the loss of state funding, schools labeled "failing to make AYP" to have restrictions on their use of federal funding that is not otherwise required.

48. Schools labeled as "failing to make AYP" have a more difficult time recruiting and keeping educators, which can necessitate additional recruiting expense.

49. Furthermore, teachers that are employed in schools labeled as "failing to make AYP" may be required to work longer hours and more school days than stated in their contract.

50. Teachers at schools that fail to make AYP also have more difficulty finding other employment should they choose to leave.

Prayer For Relief

THEREFORE, Plaintiffs request that the Court:

1. Declare that USDOE breached its oral agreement with the Plaintiffs regarding the interpretation of 20 U.S.C. § 6316(b) (2) (B), and that USDOE's new interpretation lacks the authority of law; arbitrary and capricious; and an abuse of USDOE's discretion.

2. In the alternative, or in addition, declare that USDOE's interpretation of 20 U.S.C. § 6316 (b) (2) (B) is without scientific basis or evidence in educational research and is therefore arbitrary and capricious and an abuse of USDOE's discretion.

3. Declare that USDOE's new interpretation violates the statutory discretion given the SEA under 20 U.S.C. § 6316 (b) (2) (B) and is invalid as a matter of law.

4. Declare that USDOE's failure to grant a hearing violates the Administrative Procedures Act.

5. Alternatively, or in addition, declare that in the event there is no administrative review process the lack of an administrative review is a violation in this incident and the state has not been provided an opportunity to challenge USDOE's decision without placing hundreds of millions of dollars of federal funding at risk.

6. Award the reimbursement of federal and state monies that has been spent by schools in "School Improvement" because of the test scores of their LEP students with less than three years English instruction.

7. Award the reimbursement of federal and state moneys to ADE, which it has spent in the assistance of and the monitoring of the schools that failed to make AYP because of the test scores of LEP students with less than three years of English instruction.

8. The court award Plaintiffs' costs and attorneys' fees, and grant such other and further relief as may be proper.

Respectfully Submitted,

s/Chad B. Sampson
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Kevin Ray (Bar No. 007485)
Chad B. Sampson (Bar No. 022007)
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Attorneys for Plaintiffs

VERIFICATION

I, Tom Horne, declare as follows:

1. That I am the Superintendent of Public Instruction of the Arizona Department of Education.
2. That I have read the Complaint For Declaratory Judgment and know the contents thereof.
3. That the statements and information contained in the Complaint For Declaratory Judgment are true to the best of my knowledge, information or belief.

Executed on June 18th, 2008.

Tom Horne

Tom Horne
Arizona Superintendent of Public Instruction

Gail L. Jackson

GAIL L. JACKSON
Notary Public - Arizona
Maricopa County
Expires 09/15/08

#118945

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2008, I electronically transmitted the attached Complaint of Declaratory Judgment to the Clerk's Office using the CM/ECF System for filing and sent via certified mail return receipt, a copy of the attached Complaint of Declaratory Judgment to the following parties:

Margaret Spellings
Secretary of Education
US Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Diane J. Humetewa
United States Attorney for District of Arizona
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, AZ 85004

Peter Nickles
Interim Attorney General
441 4th Street NW, Suite 1060N
Washington, DC 20001

/s/Chad Sampson

Exhibit List

Exhibit 1	Reporter's Transcript of Proceedings Motions Hearing dated February 1, 2007
Exhibit 2	Order dated February 5, 2007
Exhibit 3	Letter to Tom Horne from Kerri L. Briggs, Ph.D. dated June 28, 2007
Exhibit 4	Letter to Chad Sampson from Kerri L. Briggs, dated August 6, 2007

Exhibit 1

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ARIZONA STATE DEPARTMENT OF EDUCATION, Plaintiff, vs. UNITED STATES DEPARTMENT OF EDUCATION, et al., Defendant.	)	CV 06-01719-PHX-DGC Phoenix, Arizona February 1, 2007

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTIONS HEARING

Official Court Reporter:
Patricia Lyons, RPR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc. 41
Phoenix, Arizona 85003-2150
(602) 322-7257

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

15:04:32 Certainly if Your Honor grants our motion, Arizona can get meaningful judicial review under the GEPA. The GEPA procedure does not preclude judicial review, it merely postpones it until there has been an administrative determination, and then
15:04:47 judicial review is fully available in the Court of Appeals.

And importantly, like in -- in Thunder Basin, any final agency enforcement action here would be stayed, has to be stayed pending the completion of judicial review under the GEPA.

15:05:05 This case does not fall within the other exception to Thunder Basin for our claim's considered wholly collateral to a statutes review provisions and outside the agency's expertise. The meaning of the appeals provision would be central, not collateral to, any enforcement proceeding for our
15:05:23 Arizona's abuse of the appeals provision. Arizona has failed utterly to explain the legal significance of the so-called oral agreement that it discusses in its complaint to the claim that is before you today, the declaratory judgment claim, or to the merits of the meaning of the appeals provision.

15:05:45 So when -- so in the posture of noncompliance, we believe that Thunder Basin clearly precludes the claim. Nor can Arizona evade the GEPA and the rule of Thunder Basin by going into compliance for purposes of this lawsuit, which we believe is what they have done.

15:06:02 In the Connecticut case that Your Honor referred to,

as you know, the Court applied Thunder Basin in a similar No Child Left Behind Act case to a state that was always in compliance. And here Arizona has the same option of complying and then bringing an action for judicial review that Connecticut did. In other words, it can file a plan amendment and seek judicial review of a denial of a plan amendment under the APA, Administrative Procedure Act. Arizona has chosen not to go that route.

THE COURT: Tell me, Ms. Berman, what a plan amendment would provide in this case.

MS. BERMAN: Well, Your Honor, presumably a plan amendment would propose to use the appeals provision in the way that Arizona had been using it. To allow it to exclude LEP student scores who have been served less than three years blanketly, you know, on a -- en masse way under the appeals provision and not by a case-by-case basis.

THE COURT: So you're saying if Arizona submitted such a plan amendment, and the secretary denied it because it didn't comply with the appeals provision in the statute, Arizona could then take her denial directly to this court under the Administrative Procedures Act?

MS. BERMAN: Correct. To District Court, yes. That's what the Connecticut -- that's what -- that's the position the Department took in the Connecticut case, and that's what the Connecticut case found, Connecticut judge

found.

THE COURT: Has that ever been communicated to the State before?

MS. BERMAN: Well, I mean it's -- they -- I presume they're aware of the Connecticut case. It's never been communicated in the context of this litigation. But I mean I certainly would think they're aware of that procedure.

THE COURT: Well, in -- if they didn't do that, I now understand it's your position that they can do that. Do you agree that the only way under your view that they could obtain judicial review would be to violate the Act?

MS. BERMAN: It would be to what?

THE COURT: Violate the Act.

MS. BERMAN: Your Honor, I -- I certainly think, even outside of the Connecticut case, that the GEPA contemplates that that's what states should have to do, yes. The GEPA contemplates that states may indeed have to violate the secretary's commands in order to obtain review of the secretary's positions.

THE COURT: As you know, the case that Judge Kravitz decided in Connecticut cites to a First Circuit decision, the Eastern Bridge case, which construes the first exception that you described to Thunder Basin, and says that that exception applies if meaningful judicial review cannot be obtained. And one reason that it might not be available is if the party has

Exhibit 2

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizona State Department of Education, Plaintiff, vs. United States Department of Education; Margaret Spellings, in her capacity as Secretary of the United States Department of Education, Defendants.	No. CV-06-1719-PHX-DGC **ORDER**

The Arizona State Department of Education ("ADE") has filed this action against the United States Department of Education ("USDE") and Margaret Spellings, Secretary of the USDE ("Secretary"). Dkt. #1. ADE's claim for declaratory relief concerns the meaning of a particular provision in the No Child Left Behind Act of 2001 ("NCLB), 20 U.S.C. §§ 6301 *et seq.*

Defendants have filed a motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. #9. ADE has responded and Defendants have filed a reply. Dkt. ##16-17. The Court heard oral argument on February 1, 2007. Having considered the parties' arguments and the applicable legal authority, the Court concludes that this case must be dismissed for lack of subject matter jurisdiction.

I. Motion to Dismiss Standard.

In ruling on a motion to dismiss under either Rule 12(b)(1) or Rule 12(b)(6), the Court must accept all material factual allegations in the complaint as true. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004); *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). The Court must also assume that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994). The Court may not assume, however, that the plaintiff can prove facts different from those alleged in the complaint. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005).

II. Background Facts.

This description of the facts is taken from ADE's verified complaint and the relevant statutes. As noted above, all allegations of the complaint are assumed to be true for purposes of this decision.

Title I of the Elementary and Secondary Education Act of 1965 ("ESEA") provides for federal educational grants to states that meet certain requirements. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 6301-7941). On January 8, 2002, President George W. Bush signed into law the NCLB, a comprehensive educational reform package that amended the ESEA. Pub. L. No. 107-110, 115 Stat. 1425. The primary purpose of the NCLB is to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments." 20 U.S.C. § 6301.

The NCLB requires each state that receives Title I funds to determine that its public schools are making "adequate yearly progress" ("AYP") toward enabling all students to meet the state's academic achievement standards. 20 U.S.C. § 6311(b)(2). A school's AYP is determined through the use of standardized tests. The NCLB requires that such tests be given annually to all students, including students whose grasp of English is limited – referred

to in the NCLB as "limited English proficient" ("LEP") students. 20 U.S.C. § 6311(b)(3)(C)(ix); *see* 34 C.F.R. § 200.6(b). To accommodate the special needs of LEP students, the NCLB provides that such students, during their first three years of school in the United States, "shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments . . . including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas[.]" 20 U.S.C. § 6311(b)(3)(C)(ix)-(x); *see* 34 C.F.R. § 200.6(b).

Generally speaking, a school fails to make AYP if one of certain specified subgroups of students in any grade fails to meet the state's academic achievement standards. 20 U.S.C. § 6311(b)(2)(I). A school that fails to make AYP may be identified under the NCLB for improvement, corrective action, or restructuring. 20 U.S.C. § 6316(b)(1)-(8). A school may appeal any such identification to the state educational agency on the ground that the identification "is in error for statistical or other substantive reasons[.]" 20 U.S.C. § 6316(b)(2)(B). The agency is required to consider the appeal before making a final determination as to the school's identification status. *Id.*

Arizona's standardized test for determining whether its schools are making AYP is the Arizona Instrument to Measure Standards ("AIMS") test. A.R.S. § 15-741. Consistent with the NCLB, AIMS tests are given annually to all Arizona public school students. *See* Dkt. #1 ¶ 9; 20 U.S.C. § 6311(b)(2)-(3).

In November 2000, Arizona voters approved Proposition 203, an initiative measure regarding English language education for public school students. *See* A.R.S. §§ 751-755. Proposition 203 requires, among other things, that all annual standardized tests be given in English. *See* A.R.S. § 15-755. This requirement prohibits Arizona schools from testing LEP students in their native languages as permitted by the NCLB. Dkt. #1 ¶ 12; *see* 20 U.S.C. § 6311(b)(3)(C)(ix).

Concerned about the results of testing LEP students in English, the Superintendent of ADE engaged in negotiations with the USDE regarding the possible exclusion of LEP student test scores from the determination of whether schools make AYP. Dkt. #1 ¶ 12. The

negotiations ultimately led to the following 2003 agreement: ADE would follow the general policy of including the tests scores of all LEP students who had completed at least two years of school; any school that failed to make AYP as a result of such scores could appeal that determination under § 6316(b)(2)(B); ADE would have discretion under § 6316(b)(2)(B) to grant such appeals and authorize schools to exclude the test scores of LEP students during their first three years at the school. *Id.* ¶ 15. ADE implemented this agreement and began granting the appeals.

In April 2005, a team from the USDE monitored ADE's practices under the NCLB. The team issued a monitoring report that found that ADE's practice of granting appeals under § 6316(b)(2)(B) and allowing schools to exclude test results from LEP students violated the NCLB. The report required ADE to "cease the practice of allowing appeals on the basis of . . . LEP students with less than three years of language education services." *Id.* ¶¶ 25-26.

III. Does the Court Have Subject Matter Jurisdiction?

As noted above, § 6316(b)(2)(B) permits state educational agencies to consider whether a particular school's AYP determination "is in error for statistical or other substantive reasons[.]" ADE contends that it has discretion under this provision to exclude LEP student test scores that do not accurately reflect the type of academic progress with which the NCLB is concerned. Dkt. #1 ¶ 21. ADE claims that if it continues to grant appeals based on its interpretation of § 6316(b)(2)(B), it risks a determination by the USDE that its academic assessment program fails to comply with the NCLB. *Id.* ¶ 28. ADE further claims that under the General Education Provisions Act ("GEPA"), 20 U.S.C. §§ 1221-1240, the USDE can require Arizona to refund all Title I funds used in violation of the NCLB and can withhold future funding based on such violations. *Id.* ¶ 29 (citing 20 U.S.C. §§ 1234a, 1234d). Title I funds received by Arizona currently exceed $250,000,000 per year. Dkt. #9 at 6. ADE asks the Court to declare that § 6316(b)(2)(B) grants ADE "discretion to consider the fact that [LEP] students in Arizona must be assessed in English in determining whether a proposed AYP identification is in error for statistical or other substantive reasons, and . . . to continue to grant appeals as it has been doing." Dkt. #1 at 7-8.

Defendants note that while the USDE has found ADE to be in violation of the NCLB, the Secretary has not initiated an enforcement action. Dkt. #9 at 9. Defendants argue that ADE's request for declaratory relief regarding the Secretary's interpretation of § 6316(b)(2)(B) is a pre-enforcement challenge foreclosed by the comprehensive enforcement and review scheme of the GEPA, 20 U.S.C. §§ 1234-1234i. *Id.*

The GEPA provides the Secretary with various tools for enforcing the provisions of any "applicable program." 20 U.S.C. §§ 1234a-f (authorizing the Secretary to recover and withhold funds, issue cease and desist orders, enter into compliance agreements, and take any other action authorized by law). The GEPA defines "applicable program" as "any program for which the Secretary or the [USDE] has administrative responsibility as provided by law or by delegation of authority pursuant to law." 20 U.S.C. § 1221(c)(1). The NCLB constitutes an "applicable program" under the GEPA because the USDE is the federal agency responsible for administering it. *See Cal. Dep't of Educ. v. Bennett*, 833 F.2d 827, 829 n.4 (9th Cir. 1987) (stating that the USDE was responsible for administering the NCLB's predecessor statute, Title I of the ESEA); *Bell v. New Jersey & Pennsylvania*, 461 U.S. 773, 780-93 (1983) (holding that the USDE had the administrative responsibility of making the initial determination of the appropriate use of Title I funds under the GEPA); *see also* Dkt. #1 ¶ 5 (alleging that the USDE "is an agency of the United States of America charged with administering the [NCLB]").

When the Secretary undertakes an enforcement action, the GEPA requires that notice of the alleged violation be given to the alleged offender. 20 U.S.C. §§ 1234a(a)(1), 1234d(b), 1234e(a)(2). The alleged offender is then entitled to a hearing before an administrative law judge within the USDE. 20 U.S.C. §§ 1234a(b)-(c), 1234d(c), 1234e(b). The administrative law judge's decision may be appealed to the Secretary, who reviews it for "substantial evidence." 20 U.S.C. § 1234d(e). If the Secretary does not set aside the decision, it becomes a final agency action after 60 days. 20 U.S.C. § 1234d(f). If the Secretary sets aside or modifies the judge's decision, it becomes a final agency action upon written notice to the alleged offender. *Id.* Any final agency action may be appealed to the

United States Court of Appeals. 20 U.S.C. §§ 1234a(g), 1234d(f), 1234g(a)-(b). Actual enforcement may occur only after judicial review is completed. 20 U.S.C. § 1234a(f).

Defendants cite *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), in support of their argument that ADE's claim is a pre-enforcement challenge precluded by the GEPA. Dkt. #9 at 9. In *Thunder Basin*, the Supreme Court held that the enforcement and review procedures of the Federal Mine Safety and Health Amendments Act ("Mine Act"), 30 U.S.C. § 801 *et seq.*, prevented a district court from exercising jurisdiction over a mine operator's pre-enforcement challenge to an order issued by the Secretary of Labor. 510 U.S. at 202. Defendants argue that the enforcement and review procedures of the Mine Act are similar in all respects to the enforcement and review procedures of the GEPA, and that, like the district court in *Thunder Basin*, this Court lacks subject matter jurisdiction. Dkt. #9 at 9-14.

The question is one of Congressional intent. Congress created federal district courts, and Congress determines the scope of their jurisdiction. As the Supreme Court said long ago, "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Thus, "[i]n cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body [rather than to the district courts] where such an intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin*, 510 U.S. at 207 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)) (footnote omitted). "Whether a statute is intended to preclude judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Id.* (citation omitted).

The language of GEPA does not answer the question. Nothing in the statute expressly precludes pre-enforcement judicial review in district court. The structure, purpose, and legislative history of the GEPA persuade the Court, however, that the statute was intended to create a comprehensive scheme of administrative and judicial review that precludes actions in district court. On these issues the Court finds the recent decision in *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006), to be thorough, thoughtful, and sound.

The comprehensive enforcement and review scheme of the GEPA is analogous to the Mine Act at issue in *Thunder Basin*. *Id.* at 482-84 (comparing 20 U.S.C. §§ 1234d and 1234g with 30 U.S.C. §§ 814, 816, and 823). The GEPA is designed to channel disputes over the Secretary's interpretation of the statutes she administers to the USDE for review, followed by appeal to the Court of Appeals. The legislative history of GEPA confirms that Congress sought to create "a comprehensive system for enforcement by the [Secretary] of the requirements related to educational programs." H.R.Rep. No. 95-1137, at 141 (1978) (cited in *Spellings*, 453 F. Supp. 2d at 484). That comprehensive system does not include pre-enforcement review in federal district court.

The Court accordingly concludes that ADE's claim in this case, like the State of Connecticut's claim in *Spellings*, is an impermissible pre-enforcement challenge under the GEPA. *Spellings*, 453 F. Supp. 2d at 482-89; *see Bell*, 461 U.S. at 778 (holding that the GEPA requires final agency action before judicial review is available); *South Dakota v. Alexander*, 968 F.2d 1, 2 (8th Cir. 1992) (holding that the State was not entitled to judicial review of the Secretary's preliminary decision seeking refund of Title I funds because the decision was not a final agency action under the GEPA).

ADE makes several arguments to the contrary. Dkt. #16 at 6-13. The Court concludes that none of them has merit.

First, ADE argues that the "Supreme Court has long recognized a 'strong presumption that Congress intends judicial review of administrative action.'" *Id.* at 6-7 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). As the Supreme Court explained in *Thunder Basin*, however, "[b]ecause court of appeals review is available [under the administrative scheme], this case does not implicate the strong presumption that Congress did not mean to preclude judicial review." 510 U.S. at 207 n. 8 (internal quotation marks and citation omitted).

Second, ADE argues that the GEPA is distinguishable from the Mine Act at issue in *Thunder Basin*. Dkt. #16 at 7-8. ADE notes that Congress specifically had amended the Mine Act to prevent mine operators from filing suit in district court to delay the abatement

of Mine Act violations, and that no such specific Congressional intent is apparent here. ADE also notes that this action was not filed to delay the abatement of violations of the NCLB, but to remedy the damages suffered by ADE and Arizona schools as a result of Defendants' violation of their agreement and incorrect interpretation of § 6316(b)(2)(B). It is true that this case lacks the clear Congressional effort to limit district court review that was evident in *Thunder Basin*, and therefore presents a closer question. The Court concludes, nonetheless, that the overall structure, purpose, and legislative history of the GEPA fairly reflect an intent to preclude the type of pre-enforcement judicial review sought by ADE. *See Spellings*, 453 F. Supp. 2d at 485.

Third, ADE argues that the administrative procedures established in the GEPA are not sufficient and cannot be allowed to foreclose adjudication of ADE's claim. Dkt. #16 at 9. The Court does not agree. ADE alleges that the USDE has ordered ADE to cease the practice of granting appeals in violation of § 6316(b)(2)(B). *See* Dkt. #1 ¶ 25. The GEPA provides for administrative review of the USDE order. 20 U.S.C. § 1234e. Granted, such review will be available only after the Secretary's commences an enforcement action, but it will be available. The GEPA provides a "'meaningful and adequate opportunity for judicial review' after final agency action." *Spellings*, 435 F. Supp. 2d at 484 (citation omitted); *see* 20 U.S.C. § 1234g.

Fourth, relying on an exception recognized in *Thunder Basin*, ADE argues that its claim is "wholly collateral" to the GEPA's administrative review process and outside USDE's expertise because the claim involves "the specific factual details of an agreement reached by the parties and the effect of [ADE's] reliance on that agreement." Dkt. #16 at 9; *see Thunder Basin*, 510 U.S. at 213. As counsel for ADE rightly conceded at oral argument, however, the agreement between ADE and USDE cannot alter the meaning and effect of § 6316(b)(2)(B), nor can it nullify the provision. The alleged agreement might constitute evidence that ADE's interpretation of the provision is correct and was once embraced by the USDE, but at the end of the day the dispute between the parties will turn on the meaning and effect of § 6316(b)(2)(B), a question that falls squarely within USDE's expertise and the

comprehensive review provisions of the GEPA. *See Spellings*, 453 F. Supp. 2d at 487 (holding that interpretation of unfunded mandate provision of the NCLB is not wholly collateral to the GEPA's administrative review process because it "falls squarely within the expertise of the Secretary[.]"); *Thunder Basin*, 510 U.S. at 214 ("Petitioner's statutory claims at root require interpretation of the parties' rights and duties under [the Mine Act], and as such . . . fall squarely within the Commission's expertise.").

Fifth, ADE cites federal cases that have assumed jurisdiction over pre-enforcement actions and argues that this Court should follow suit. Dkt. #16 at 10 (citing *Gen. Elec. Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004); *Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868 (3d Cir. 1996); *Rocky Mtn. Radar, Inc. v. FCC*, 158 F.3d 1113 (10th Cir. 1998)). The cases cited by ADE are plainly distinguishable from this case. Both *General Electric* and *Kreschollek* involved collateral constitutional challenges to entire administrative schemes. *Gen. Elec.*, 360 F.3d at 188 ("The General Electric Company appeals the dismissal of its amended complaint alleging that the administrative orders regime of [CERCLA] violates the Due Process Clause of the Fifth Amendment."); *Kreschollek*, 78 F.3d at 869 ("Kreschollek's claim presents a new twist on the question [of jurisdiction] because his challenge to the Longshore Act is a constitutional one[.]"). ADE has asserted no such constitutional challenge. *Rocky Mountain Radar* involved an administrative scheme that did not preclude pre-enforcement actions. 158 F.3d at 1122. For the reasons explained above, the GEPA does.

Sixth, ADE argues that Arizona should not be forced to violate the Secretary's mandate and risk onerous financial penalties – potentially, the loss of hundreds of millions of dollars in Title I funding – in order to obtain a judicial ruling on the meaning of § 6316(b)(2)(B). The Supreme Court has recognized that serious due process concerns might arise when a party must either obey the law and thereby forego the possibility of judicial review, or risk severe penalties in order to gain access to the courts. *Thunder Basin*, 510 U.S. at 218 (majority opinion), 221 (Scalia, J., concurring). Some courts have treated the issue not as a constitutional problem, but as an exception to the preclusion rule of *Thunder Basin*,

stating that the exception applies when judicial review is effectively foreclosed because "the penalty for violation is set so high that no rational person would dare test the legality of administrative action by refusing to comply." *E. Bridge, LLC v. Chao*, 320 F.3d 84, 90 (1st Cir. 2003).

Whether treated as a due process concern or an exception to *Thunder Basin*, these principles do not aid ADE. Counsel for Defendants asserted during oral argument that ADE may obtain judicial review of § 6316(b)(2)(B) without risking severe penalties. This is how: ADE is required by the NCLB to file and obtain approval of an educational plan for Arizona (20 U.S.C. § 6311(a)); ADE may file with the Secretary a proposed amendment to the plan that includes ADE's interpretation of § 6316(b)(2)(B); if the Secretary rejects the plan amendment, ADE may seek immediate judicial review in district court under the Administrative Procedures Act. By this means, Defendants assert, ADE can obtain judicial review of its interpretation of § 6316(b)(2)(B) without risking serious sanctions. When questioned about this assertion during oral argument, counsel for ADE agreed that judicial review of § 6316(b)(2)(B) can be obtained in this manner. Thus, as was true of the plaintiff in *Thunder Basin*, ADE is not precluded from obtaining meaningful judicial review by the risk of severe penalties. As the district court recognized in *Spellings*: "Because the refusal to approve a plan amendment may be reviewed by a district court without the risk of the State losing federal funding, the State is able to continue to comply with the [NCLB] while at the same time seeking judicial review of it's claims regarding the [NCLB]." *Spellings*, 453 F. Supp. 2d at 488.[1]

Finally, ADE argues that this Court should exercise jurisdiction because continued administrative review before ADE will be futile. Dkt. #16 at 12-13. When Congress enacted GEPA, however, it knew that the statute "contemplates judicial review only *after* the [Secretary] has determined that a state has violated the [NCLB]." *Spellings*, 453 F. Supp. 2d at 486-87 (emphasis in original). Requiring "final agency action, even if the ultimate results

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[1]Like the court in *Spellings*, this Court states no opinion on the nature or scope of such judicial review under the Administrative Procedures Act. 453 F. Supp. 2d at 488 n. 17.

can be surmised, is not at all futile" because it may resolve the issue between the parties and "judicial review would be enhanced by forcing the parties to take concrete positions at the administrative level and by development of a full administrative record." *Id.* at 489.

IV. Conclusion.

This Court lacks subject matter jurisdiction over this pre-enforcement declaratory judgment action regarding the meaning of § 6316(b)(2)(B). The Court accordingly will grant Defendants' motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.[2]

IT IS ORDERED:

1. Defendants' motion to dismiss (Dkt. #9) is **granted**.

2. The Clerk of Court shall **terminate** this action.

DATED this 5th day of February, 2007.

David G. Campbell
United States District Judge

[2]During oral argument, counsel for ADE requested leave to amend the complaint. When questioned closely on this issue, counsel made clear that the amendment would address only the current injury being suffered by ADE. Because the proposed amendment would be relevant only to issues the Court need not address in light of its ruling on the jurisdictional question – the ripeness and standing issues raised by the USDE's motion – the Court sees no need to permit the amendment before entering this ruling. The Court also need not address Defendants' argument that the complaint fails to state a claim for relief.

Exhibit 3

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

THE ASSISTANT SECRETARY

JUN 28 2007

The Honorable Tom Horne
Superintendent of Public Instruction
Arizona Department of Education
1535 West Jefferson Street, Bin Z
Phoenix, Arizona 85007

Dear Superintendent Horne:

I am writing in response to Arizona's request to amend its State accountability plan under Title I of the *Elementary and Secondary Education Act of 1965* (ESEA), as amended by the *No Child Left Behind Act of 2001* (NCLB). Following our discussions with your staff, the approved changes are now included in an amended State accountability plan that Arizona submitted to the Department on May 21, 2007, which we will post on the Department's website. A summary of the amendments submitted for the 2006–07 school year is enclosed with this letter. As you know, any further requests to amend the Arizona accountability plan must be submitted to the Department for review and approval as required by section 1111(f)(2) of Title I.

Please also be aware that approval of Arizona's accountability plan for Title I, including the amendments approved above, does not indicate that the plan complies with Federal civil rights requirements, including Title VI of the *Civil Rights Act of 1964*, Title IX of the *Education Amendments of 1972*, Section 504 of the *Rehabilitation Act of 1973*, Title II of the *Americans with Disabilities Act*, and requirements under the *Individuals with Disabilities Education Act*.

I am confident that Arizona will continue to advance its efforts to hold schools and school districts accountable for the achievement of all students. I wish you well in your school improvement efforts. If you need any additional assistance in your efforts to implement the standards, assessment and accountability provisions of NCLB, please do not hesitate to contact Catherine Freeman (catherine.freeman@ed.gov) or Grace Ross (grace.ross@ed.gov) of my staff.

Sincerely,

Kerri L. Briggs, Ph.D.

Enclosure

cc: Governor Janet Napolitano
Robert Franciosi

Amendments to the Arizona Accountability Plan

The following is a summary of the State's amendment requests. Please refer to the Department's website (www.ed.gov/admins/lead/account/stateplans03/index.html) for the complete Arizona accountability plan.

Acceptable amendments

The following amendments are aligned with the statute and regulations.

- **Implementation of new regulations regarding limited English proficient (LEP) students Element (5.5)**

  Revision: Arizona will count recently arrived LEP students as having participated in State assessments if they take Arizona's reading and mathematics assessments. Arizona will not include the scores of these students when determining adequate yearly progress (AYP) for the year in which they are classified "recently arrived" (i.e., a one-time exclusion). Arizona will include the scores of former LEP students in the LEP subgroup for 2 additional years in calculating AYP.

- **Late AYP Decisions (Element 1.4)**

  Revision: Arizona requested to release final 2007 AYP determinations on September 5th instead of September 1st. This change was requested because September 1 is on the Saturday of Labor Day weekend.

  This change is only for 2006-07 and is conditioned on the fact that preliminary AYP determinations will still be made by August 1st.

Unacceptable amendments

The following amendments are not aligned with the statute and regulations and are therefore not approved.

- **Grounds for changing an AYP determination (Element 9.2)**

  Arizona requested to include, as grounds for appeal of a school's AYP determination, evidence that the school's failure to make AYP is due to the inclusion of the non-proficient scores of limited English proficient (LEP) students who are in the first three years of enrollment in a school in the United States. The Department cannot approve this request. We note that section 1116(b)(2)(B) of the ESEA provides that, "[I]f the principal of a school proposed for identification...believes, or a majority of the parents of the students enrolled in such school believe, that the proposed identification is in error for statistical or other substantive reasons, the principal may provide supporting evidence to the local educational agency, which shall consider that evidence before making a final determination." Overturning a school's AYP determination based on the scores of LEP students who have not been in U.S. schools for at least three years, however, does not constitute "statistical or other substantive reasons." To the contrary, it conflicts directly with other provisions of the ESEA. Notably, as required in section 1111(b)(2)(C)(i) of the ESEA, AYP must be defined by a State in a manner that applies the same high standards of academic achievement to *all* public elementary and secondary school students in the State. "All public...school students" includes LEP students who have been in U.S. schools for less than three years (with the limited exception of "recently arrived" LEP students as authorized through the Department's September 2006 Title I regulations). Moreover, under section 1111(b)(2)(C)(v)(II), a State must separately measure the achievement of specific subgroups, including LEP students. Allowing Arizona to use the appeal process to exclude many, if not all, LEP students from AYP determinations simply because they have not been in U.S. schools for

at least three years would effectively override the explicit statutory requirements that LEP students be included in AYP determinations and that schools be held accountable for their academic achievement.

- **Accommodations that invalidate test results (Element 5.4)**

  The Department cannot approve, through the accountability plan amendment process, Arizona's request to develop and employ a conversion table that will convert the scores of students tested with a calculator, numbers chart, arithmetic tables, or manipulatives on the AIMS mathematics test if the State determines that these accommodations invalidate results by changing the construct of the test.

  Rather, this issue is an aspect of the State's standards and assessment system because it deals specifically with the validity and reliability of assessment results. If Arizona wishes to pursue this request, it must submit evidence that the accommodations do not invalidate the assessment to the Department for peer review through the standards and assessment review process.

- **Including Students with Disabilities (Element 5.3)**

  Arizona requested permission to continue to use interim flexibility offered by the Secretary for calculating AYP for the students with disabilities subgroup for the 2006–07 school year. The Department cannot approve this amendment because Arizona did not meet the core principle that at least 95 percent of students with disabilities participated in either the reading/language arts or mathematics assessments. As noted in the Secretary's announcement on May 10, 2005 (refer to: http://www.ed.gov/policy/elsec/guid/raising/disab-acctplan.html), having a participation rate over 95 percent for the students with disabilities subgroup is a core principle for eligibility for interim flexibility. As Arizona reported to the Department, the participation rate for students with disabilities was 93 percent in mathematics and 89 percent in reading/language arts for 2005–06.

- **Graduation Rate (Element 7.1)**

  Arizona proposed that students who graduate more than four years after their first enrollment in the ninth grade be counted fractionally (.70) in the graduation rate formula. Section 1111(b)(2)(C)(vi) of ESEA clearly states that graduation rate must be calculated as those graduates who earn a regular diploma in the "standard number of years."

Exhibit 4

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

THE ASSISTANT SECRETARY

August 6, 2007

Via U.S. Mail

Mr. Chad B. Sampson
Assistant Attorney General
Office of the Attorney General, State of Arizona
127 5 West Washington
Phoenix, AZ 85007-2926

Re: Request/Petition for Hearing on Amendment to State Accountability Plan

Dear Mr. Sampson:

I am writing in response to your July 13, 2007 letter requesting a formal hearing for review of the Department's decision to decline to approve certain amendments to Arizona's State Accountability Plan. In particular, you have requested a formal hearing to review the denial of Arizona's requested amendment to Element 9.2 – Grounds for Changing an AYP Determination. I regret to inform you that your request for a hearing is hereby denied, as the State of Arizona has no right to a hearing based on the denial of the State's requested amendment to its Accountability Plan.

In your letter, you state that you are requesting a formal hearing regarding the Department's decision to disapprove the requested amendment pursuant to 20 U.S.C. § 6311(e)(1)(E). That provision states, in pertinent part:

> The secretary shall . . . not decline to approve a State's ***plan*** before –
>
> (i) offering the State an opportunity to revise its plan;
>
> (ii) providing technical assistance in order to assist the State to meet the requirements of subsections (a), (b), and (c); and
>
> (iii) providing a hearing . . . .

20 U.S.C. § 6311(e)(1)(E) (emphasis added). By the plain terms of that provision, the right to a hearing attaches only to the Secretary's disapproval of an original State accountability plan, not the Department's disapproval of a plan amendment. Accordingly, the State of Arizona does not have a right to a hearing based on the Department's disapproval of its requested plan amendment, and the Department denies the State's request for a formal hearing.

Please be advised that, prior to disapproving the requested amendment regarding Grounds for Changing an AYP Determination, the Department carefully reviewed and considered, *inter alia*: (1) Arizona's request to amend its State accountability plan; (2) Plaintiff's Response in Opposition to the Secretary's Motion to Dismiss in the litigation entitled *Arizona State Dept. of Education v. United States Dept. of Education and Margaret Spellings*, No. CV-06-1719-PHX-DGC, United States District Court for the District of Arizona; and (3) a September 21, 2006 letter from Superintendent Tom Horne to Secretary Margaret Spellings, which enclosed a copy of a September 15, 2006 letter from Superintendent Horne to Congressman Howard McKeon. If you have any information or documentation that is pertinent to the request to amend Arizona's accountability plan regarding Element 9.2 – Grounds for Changing an AYP Determination and that was not included within any of the aforementioned documents already reviewed by the Department, or if you wish to submit a further written submission to support the plan amendments, you are welcome to provide such new information or documentation to the Department.

Sincerely,

Kerri L. Briggs

cc: The Honorable Margaret Spellings
The Honorable Tom Horne
Mr. Robert Franciosi
Ms. Susan Segal